

1 MCGREGOR W. SCOTT
United States Attorney
2 LAURA D. WITHERS
Assistant United States Attorney
3 2500 Tulare Street, Suite 4401
Fresno, CA 93721
4 Telephone: (559) 497-4000
Facsimile: (559) 497-4099
5

6 Attorneys for Plaintiff
United States of America
7

8
9 IN THE UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 ARMANDO MARTINEZ-TORRES &
HERMINIA HERRERA-ORTIZ,
15 Defendants.
16

CASE NO. 1:20-CR-00034-DAD-BAM

STIPULATION REGARDING EXCLUDABLE
TIME PERIODS UNDER SPEEDY TRIAL ACT;
AND ORDER

DATE: September 28, 2020

TIME: 1:00 p.m.

COURT: Hon. Barbara A. McAuliffe

17 This case was set for a status conference on September 28, 2020. On May 13, 2020, this Court
18 issued General Order 618, which indefinitely continues the prior suspension of all jury trials in the
19 Eastern District of California and the prior courthouse closures as set forth in General Order 617. These
20 and previous General Orders were entered to address public health concerns related to COVID-19.

21 Although the General Orders address the district-wide health concern, the Supreme Court has
22 emphasized that the Speedy Trial Act's end-of-justice provision "counteract[s] substantive
23 openendedness with procedural strictness," "demand[ing] on-the-record findings" in a particular case.
24 *Zedner v. United States*, 547 U.S. 489, 509 (2006). "[W]ithout on-the-record findings, there can be no
25 exclusion under" § 3161(h)(7)(A). *Id.* at 507. And moreover, any such failure cannot be harmless. *Id.*
26 at 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a
27 judge ordering and ends-of-justice continuance must set forth explicit findings on the record "either
28 orally or in writing").

Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory and inexcusable—General Orders 611, 612, 617, and 618 require specific supplementation. Ends-of-justice continuances are excludable only if “the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable unless “the court sets forth, in the record of the case, either orally or in writing, its reason or finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.” *Id.*

The General Order excludes delay in the “ends of justice.” 18 U.S.C. § 3161(h)(7) (Local Code T4). Although the Speedy Trial Act does not directly address continuances stemming from pandemics, natural disasters, or other emergencies, this Court has discretion to order a continuance in such circumstances. For example, the Ninth Circuit affirmed a two-week ends-of-justice continuance following Mt. St. Helens’ eruption. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court recognized that the eruption made it impossible for the trial to proceed. *Id.* at 767-68; *see also United States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time following the September 11, 2001 terrorist attacks and the resultant public emergency). The coronavirus is posing a similar, albeit more enduring, barrier to the prompt proceedings mandated by the statutory rules.

In light of the societal context created by the foregoing, this Court should consider the following case-specific facts in finding excludable delay appropriate in this particular case under the ends-of-justice exception, § 3161(h)(7) (Local Code T4). If continued, this Court should designate a new date for the status conference. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial continuance must be “specifically limited in time”).

STIPULATION

Plaintiff United States of America, by and through its counsel of record, and defendants, by and through their counsels of record, hereby stipulate as follows.

1. By previous order, this matter was set for status on September 28, 2020.
2. By this stipulation, the parties now move to continue the status conference until December 9, 2020, and to exclude time between September 28, 2020, and December 9, 2020, under

1 Local Code T4.

2 3. The parties agree and stipulate, and request that the Court find the following:

3 a) The government has represented that the discovery associated with this case and
4 its related case includes full extractions from four cellphones of almost 100 gigabytes of data.
5 All of this discovery has been either produced directly to counsel and/or made available for
6 inspection and copying.

7 b) Counsel for defendants desire additional time to review discovery and consult
8 with their clients, which has been impeded by the present national health crisis.

9 c) Counsel for defendants believe that failure to grant the above-requested
10 continuance would deny them the reasonable time necessary for effective preparation, taking into
11 account the exercise of due diligence.

12 d) The government does not object to the continuance.

13 e) In addition to the public health concerns cited by the General Orders and
14 presented by the evolving COVID-19 pandemic, an ends-of-justice delay is particularly apt in
15 this case because counsel have been encouraged to telework and minimize personal contact to
16 the greatest extent possible. It will be difficult to avoid personal contact should the status
17 conference proceed.

18 f) Based on the above-stated findings, the ends of justice served by continuing the
19 case as requested outweigh the interest of the public and the defendant in a trial within the
20 original date prescribed by the Speedy Trial Act.

21 g) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161,
22 et seq., within which trial must commence, the time period of September 28, 2020 to December
23 9, 2020, inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local
24 Code T4] because it results from a continuance granted by the Court at defendant's request on
25 the basis of the Court's finding that the ends of justice served by taking such action outweigh the
26 best interest of the public and the defendant in a speedy trial.

27 4. Nothing in this stipulation and order shall preclude a finding that other provisions of the
28 Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial

1 must commence.

2 IT IS SO STIPULATED.

3
4 Dated: September 21, 2020

5 MCGREGOR W. SCOTT
6 United States Attorney

7 /s/ LAURA D. WITHERS
8 LAURA D. WITHERS
9 Assistant United States Attorney

10 Dated: September 21, 2020

11 /s/ Nicholas Reyes
12 NICHOLAS REYES
13 Counsel for Defendant
14 ARMANDO MARTINEZ-TORRES

15 Dated: September 21, 2020

16 /s/ Virna Santos
17 VIRNA SANTOS
18 Counsel for Defendant
19 HERMINIA HERRERA-ORTIZ

20 **ORDER**

21 IT IS SO ORDERED that the Status Conference is continued from September 28, 2020 to
22 **December 9, 2020, at 1:00 p.m. before Magistrate Judge Barbara A. McAuliffe.** Time is excluded
23 pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv).

24 IT IS SO ORDERED.

25 Dated: **September 21, 2020**

26 /s/ *Barbara A. McAuliffe*
27 UNITED STATES MAGISTRATE JUDGE
28